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No. 89-144

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Local Union No. 246, Laborers' International Union of North America, AFL-CIO (Union) submits this reply brief in support of its petitions for leave to intervene and for a writ of certiorari in order to address arguments first raised by respondents Bickerstaff Clay Products Co., Inc. (Bickerstaff) and the National Labor Relations Board (NLRB or Board) in their briefs in opposition to the petitions.

1. The NLRB suggests that the petition for leave to intervene is inappropriate because the Union has failed to "identify the proceeding, if any, that is now pending before this Court and in which it seeks to intervene." NLRB Br. in Opp. at 6. In granting other petitioners leave to intervene in order to present petition for writs of certiorari, however, this Court has implicitly acknowledged that under certain circumstances the act of intervention itself may commence a proceeding before this Court.

The arguments against intervention raised by Bickerstaff also lack merit. First, Rules 24 and 59 of the Federal Rules of Civil Procedure do not govern a petition to intervene in this Court. Second, the reviewability of a final order of the NLRB is legally distinct from the reviewability of a prosecutorial decision by the General Counsel of the NLRB. *NLRB v. United Food and Commercial Workers, Local 23*, 484 U.S. 112 (1987). Finally, Bickerstaff's "standing" objection is doubly flawed. First, the Union petitions on its own behalf and not merely in a representative capacity on behalf of its members or the employees in the Bickerstaff bargaining unit. Second, the Court of Appeals decision upholding Bickerstaff's withdrawal of recognition of the Union cannot bar the Union from seeking judicial review of that decision.

2. The principal argument advanced by both the NLRB and Bickerstaff in opposition to the petition is that the decision of the Eleventh Circuit is not worthy of this Court's review because it is fact-bound and applied the Board's "no presumption" rule rather than the so-called "Gorman presumption." That argument is incorrect because the decision below relied in part on a modified version of the Gorman presumption; that decision conflicts with the decisions of other circuits; and the questions presented raise important issues of national labor policy. This case merits review by the Court.

A legal presumption arises where proof of one fact renders the existence of another fact so probable that it is sensible and time saving to assume the truth of the latter fact until its adversary disproves it. McCormick, *Evidence* § 343 (3d ed. 1984) (McCormick). *See generally Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB No. 113, p. 15 (1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed March 7, 1988). As petitioner previously showed, the Eleventh Circuit sought to reconcile the former Fifth Circuit's decision in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), with the Board's decision in *Station KKHI* by adopting a modified version of the Gorman presumption.

Thus, the Court of Appeals held that an employer may presume that a replacement does not support the union where "the union is negotiating for his discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day." App. 23a-24a. Bickerstaff explicitly, and the Board implicitly, contend that these circumstances are objective "facts" directly demonstrating non-support for the Union rather than facts leading to that conclusion only if one applies a presumption that that conclusion follows from those facts. However, neither the act of crossing a picket line nor that of working when the incumbent union is bargaining for the striker replacement's post-strike discharge constitutes a manifestation of the replacement's own views on the desirability of continued union representation. Only actions such as an express rejection of union membership or vocal advocacy of non-union status constitute actual evidence of non-support for the Union.

Nor can respondents herein distinguish the Eleventh Circuit's decision below from that of the Fifth Circuit in *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3835 (June 26, 1989) (No. 88-1685), on the ground that the former

is "fact-bound" and the latter is not. Each court reached its conclusions that the employer had a reasonable good faith doubt as to the union's continuing majority status through an analysis predicated on both actual facts and presumptions. In *Curtin Matheson* the Fifth Circuit relied on both the Gorman presumption and specific information about actual employee views obtained by the employer's director of employee relations in conversations with non-striking employees, strikers and a striker replacement. *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d at 365-66.

Legal presumptions are created for any of several reasons: where experience has demonstrated that the inherent probabilities are such that the existence of a particular fact is sufficient to prove the existence of a second fact; to correct an imbalance resulting from one party's superior access to the proof; or to vindicate notions of social and economic policy. McCormick § 343. The presumptions embraced below by the Court of Appeals serve none of these purposes; this Court should therefore grant the petitions and reverse that court's decision.

First, no probabilities justify a presumption of union non-support by striker replacements. A person crossing a picket line may do so for any of a host of reasons and cannot be presumed to oppose continued representation by the incumbent union. *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1174 (3d Cir. 1989); *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); *Station KKHI*, 284 NLRB No. 113, p. 16. *See also* Brief for the Petitioner, pp. 16-18 (filed Sept. 1989) (NLRB Curtin Matheson Brief) (same), *NLRB v. Curtin Matheson Scientific, Inc.*, No. 88-1685. Because picket lines are so common during strikes, adoption of a presumption that the mere crossing of the line signifies non-support of the striking union would render this presumption virtually coextensive with the Gorman presumption itself. Similarly, the common circumstances that the

striking union bargains for job preferences for strikers over their replacements does not justify a presumption from that fact that the replacements do not support union representation. *Dold Foods, Inc.*, 289 NLRB No. 156 (1988); *Station KKHI*, 284 NLRB No. 113, pp. 15-16.

Second, neither the employer nor the union is more likely to have access to proof of striker replacements' support for continued union representation. Accordingly, this factor (which our research indicates neither the Board nor the courts have considered) does not favor application of such a presumption.

Finally, a presumption of union non-support cannot be reconciled with the fundamental labor policies that underlie the presumption of continued majority support for a union. This Court has repeatedly held that the conclusive presumption of majority support for a union during the year following its certification, and the rebuttable presumption of majority support thereafter, are based on the national policy of promoting industrial peace through stability in collective bargaining relationships without impairing the free choice of employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-39 (1987); *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 202-03, 208-09 (1986). The presumptions embraced below, on the other hand, further industrial conflict and instability in collective bargaining relationships. They also undermine the national labor policy favoring protection of the right to strike. NLRA § 13, 29 U.S.C. § 163; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223-34 (1963). *See generally* NLRB Curtin Matheson Brief at 19-27.

Indeed, it is incorrect to permit a party to rebut a legal presumption expressly created to further significant national policies with a contrary presumption that serves no comparable policy. "The doctrine that the weightier presumption prevails should probably be available in any

situation which involves conflicting presumptions, and where one of the presumptions is grounded in a predominant social policy." McCormack § 344.

The Court should grant the petition herein and consider in the case at bar, along with *Curtin Matheson*, whether any presumption may be appropriately applied in determining the views of striker replacements regarding continued union representation.

Respectfully submitted,

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